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In the Supreme Court of the United States

OCTOBER TERM, 1957

KENNETH E. RENNEKAMP, INDIVIDUALLY AND DOING BUSINESS AS RADIO STATION WEMR, *Petitioner*

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 882

KENNETH E. RENNEKAMP, INDIVIDUALLY AND DOING BUSINESS AS RADIO STATION WEMR, *Petitioner*

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (34b-42b) and its memorandum decision on motion for a new trial (3a-5a)[1] are not officially reported. The *per curiam* opinion of the Court of Appeals (Pet. 15-16) is reported at 251 F. 2d 488.

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[1] References are to the pages of the two appendices from the Court of Appeals below, which were filed as part of the record in this Court by the petitioner.

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1958 (Pet. 14). The petition for a writ of certiorari was filed on March 31, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether employees who operate a commercial radio station, and whose regular duties include the receiving and broadcasting of world-wide news obtained from out-of-state sources over an Associated Press teletype, are engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

2. Whether application of the Fair Labor Standards Act to petitioner's small radio station is an unreasonable discrimination violating the Fifth Amendment, because of the exemption provided in the Act for some small newspapers and certain other small businesses.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 63 Stat. 910, 29 U.S.C. 201, *et seq.*, the pertinent provisions of which are set forth at pages 17-21 of the appendix to the petition.

STATEMENT

The Secretary of Labor brought this action to enjoin petitioner from violating the minimum wage, overtime, and record-keeping requirements of the Fair Labor Standards Act of 1938, as amended, in the employment of employees operating his commercial radio

station in Emporium, Pennsylvania. These employees worked as announcers, engineers, or announcer-engineers, editing and broadcasting news reports at regular intervals throughout the day, operating and maintaining the transmission equipment, and preparing and presenting programs (36b-37b). The radio station had in its office an Associated Press teletype machine, in operation on a twenty-four hour basis, over which world-wide news, gathered by the Associated Press, was continuously received, edited, and broadcast at regular intervals by petitioner's employees (4a; 35b-37b; Pet. 15). In addition, cables, messengers and the mails were used as communications, both in receiving and transmitting news to and from the Associated Press and its membership (36b). Also, petitioner received at the station reports of football and baseball games, originating outside the State, and rebroadcast these reports (3b).

Both courts below held that the employees were engaged in commerce within the meaning of the Act, by reason of their duties in connection with the Associated Press news reports, the operation and maintenance of transmission equipment, the preparation of commercials, and the sale of advertising for the station (40b; Pet. 15-16). The trial court, finding that defendant had substantially violated the requirements of the Act (37b-39b; 4a-5a), issued an injunction against petitioner. The Court of Appeals affirmed.

In the Court of Appeals, petitioner contended that application of the Act to its radio station was an unconstitutional discrimination because certain small newspapers are exempted from the Act. The Court of Appeals regarded this claim as "without merit" (Pet. 16).

ARGUMENT

The decision below is a correct application of principles well settled by the rulings of this Court construing the coverage of the Fair Labor Standards Act, and admittedly does not conflict with holdings of any other Court of Appeals. The lack of substance in petitioner's claim of unconstitutionality has long been settled by this Court's decisions.

1. The holding that the regular receiving, editing, and broadcasting of world-wide news from out-of-state sources was sufficient to bring petitioner's employees within the coverage of the Act is plainly in accord both with the literal terms of the statutory definition of "commerce" (which expressly includes "transmission, or communication" among the several States, Section 3(b)), and with this Court's decisions in *Lorain Journal* v. *United States*, 342 U.S. 143; *Associated Press* v. *United States*, 326 U.S. 1; and *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103. The immediate "local dissemination" of such out-of-state news, to the *listening* public no less than to the "reading public," "is an inseparable part of the flow of the interstate commerce involved" (*Lorain*, 342 U.S. at 151-152). Indeed, since the transmission of news by radio broadcasting is even more "immediate" (*id.*, at 152) than its dissemination by newspapers, *a fortiori* there is that "practical continuity of movement" which is included within the scope of the "commerce" covered by the Fair Labor Standards Act. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 568-569.

Further support for the decision below is found in this Court's decisions recognizing that "[b]y its very

nature broadcasting transcends state lines and is national in its scope and importance" (*Fisher's Blend Station* v. *Tax Com'n.*, 297 U.S. 650, 655), and that "[n]o state lines divide the radio waves" (*Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 279). See also *Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 154 (C.A. 3), certiorari denied, 340 U.S. 929; *Station WBT* v. *Poulnot*, 46 F. 2d 671 (E.D. S. Car.); *American Bond & Mortgage Co.* v. *United States*, 52 F. 2d 318 (C.A. 7); *United States* v. *Gregg*, 5 F. Supp. 848, 857 (S.D. Texas); *Whitehurst* v. *Grimes*, 21 F. 2d 787 (E.D. Ky.); *City of Atlanta* v. *Southern Broadcasting Co.*, 184 Ga. 9, 190 S.E. 594, 596-597.

2. Not only is there no conflict among the courts of appeals[2] but it has been uniformly recognized by lower courts that the Fair Labor Standards Act is applicable to radio broadcasting stations. *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380 (C.A. 5); *Wilson* v. *Shuman*, 140 F. 2d 644 (C.A. 8); *Walling* v. *Sun Publishing Co.*, 47 F. Supp. 180, 182 (W.D. Tenn.); *Fleming* v. *A. H. Belo Corp.*, 36 F. Supp. 907 (N.D. Tex.); *Fleming* v. *Capital Broadcasting Co.* (not officially reported), 1 WH Cases 486, 3 Labor Cases, Para. 60,340 (M.D. Ala.); *Mitchell* v. *Monahans Broadcasters* (not officially reported), 11 WH Cases 767, 24 Labor Cases, Para. 68,090 (W.D. Tex.); *Cummins* v. *Carteret Broadcasting Company*, 137 F. Supp. 547 (E.D. N.C.). There is not a single decision to the contrary on the coverage of either newspapers

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[2] Petitioner does not assert that there is a conflict, but claims (incorrectly) that the issues in this case "have never been squarely raised in, or directly passed upon by, any Federal court prior to the present proceeding" (Pet. 4).

or radio broadcasting stations. Even where the coverage of a newspaper's employees has been contested, coverage of employees working for an affiliated broadcasting station was conceded. See *Walling* v. *Sun Publishing Co., supra,* 47 F. Supp. at 182. Apparently, the Act's applicability to radio broadcasting is so clear that it has been generally recognized and accepted without serious contest throughout the almost 20 years the Act has been in effect.

3. Petitioner's contention that the statutory exemption for certain small newspapers without a similar exemption for small radio stations constitutes "an unwarranted, arbitrary, and unreasonable discrimination" in violation of the Fifth Amendment is conclusively answered by this Court's decision in *Mabee* v. *White Plains Publishing Co.,* 327 U.S. 178. There, the virtually identical contention—that the exemption for small newspapers (which at that time excepted only certain weeklies or semiweeklies) unreasonably discriminated against small *dailies*—was summarily dismissed by this Court with the comment (327 U.S. at 184): "The Fifth Amendment does not require full and uniform exercise of the commerce power. Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field [citing] *Steward Machine Co.* v. *Davis,* 301 U.S. 548; *Currin* v. *Wallace,* 306 U.S. 1, 13-14."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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